BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PETER M. DERR	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,598
RUSH COUNTY HEALTHCARE CENTER	)	
Respondent	)	
AND	)	
	)	
KANSAS HOSPITAL ASSOCIATION	)	
WORKERS COMPENSATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 5, 2007 Award of Administrative Law Judge Bruce E. Moore. Claimant was awarded benefits after the Administrative Law Judge (ALJ) determined claimant had suffered a 20 percent permanent partial whole body functional disability, followed by an 87.5 percent permanent partial general body disability.

Claimant appeared by his attorney, Randy S. Stalcup of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At oral argument to the Board, the parties stipulated that the 20 percent whole body functional disability determined by the ALJ in the Award was appropriate for the purpose of this award. Additionally, the parties stipulated that the 75 percent loss of task performing ability, computed by averaging the 82.5 percent task loss opinion of internal medicine specialist Daniel D. Zimmerman, M.D., with the 67.6 percent task loss opinion of R. Chris Glattes, M.D., was the proper task loss determination and was to be used for the purposes of this award. The Board heard oral argument on February 5, 2008.

ISSUE

What is the nature and extent of claimant's disability? The parties have stipulated to both the functional disability and the task loss in this matter. Therefore, the only determination left for the Board is what, if any, wage loss claimant has suffered pursuant to K.S.A. 44-510e, and whether claimant has put forth a good faith effort to find work after his last day worked with respondent. If claimant has put forth a good faith effort to find work, then claimant's actual wages will be utilized in determining the amount of claimant's wage loss and permanent partial work disability. If claimant has failed to put forth a good faith effort to obtain work after leaving respondent, then claimant's ability to earn wages will be determined and a wage loss percentage will be computed and averaged with the stipulated task loss stipulated above.

FINDINGS OF FACT

Claimant, a maintenance worker for respondent, injured his low back on October 16, 2004, while lifting a sewer snake. Claimant was referred to Dr. Glattes for medical treatment, and on July 13, 2005, he underwent an L5 laminectomy and right "laminoforaminotomy" and fusion at L5-S1. After surgery, claimant was returned to work with respondent with restrictions of no stooping or bending and was advised not to stand or sit for long periods of time. Respondent was unable to accommodate claimant's restrictions and, ultimately, claimant's employment with respondent was terminated. This record is unclear as to the exact dates claimant returned to work and as to the last day claimant worked for respondent before this termination. However, at oral argument to the Board, the parties stipulated that, for purposes of computing this award, December 1, 2006, should be utilized as claimant's last day with respondent.

After his termination from respondent, claimant began looking for a job. His job search included looking in the Hays newspaper, the Rush County newspaper and the Ness County newspaper on a weekly basis. It is noted that these papers are all published weekly. Claimant also looked at the High Plains Journal newspaper, which lists jobs in Kansas, Texas, Nebraska and Oklahoma. Claimant also regularly looked in the Ellis County newspaper and various Yellow Pages. He also called people listed in the Yellow Pages for jobs that he thought he was qualified to perform. Claimant looked for manual labor jobs which would not be "real strenuous."[1] Claimant also registered with Job Service in Hays. Other than a brief stint driving a wheat truck during the wheat harvest in 2007, claimant has not worked anywhere. He only earned about $500.00 driving the wheat truck. Claimant testified that he makes 8 to 10 job contacts per week, but as of the regular

[1] R.H. Trans. at 15.

hearing was still unemployed. Claimant maintained a written record of his job search during the period from September 20, 2006, through October 26, 2006. Claimant did not maintain a written record of his ongoing job search for any other period of time. There is no indication in this record that respondent offered claimant any form of job placement assistance or vocational training.

Claimant was referred by his attorney to vocational expert Jerry Hardin. Mr. Hardin determined that claimant retained the ability to earn $300.00 per week. This would represent a 15 percent wage loss when compared to claimant's average weekly wage before the inclusion of fringe benefits. It would represent a 36 percent wage loss after the fringe benefits were added to claimant's average weekly wage on December 2, 2006.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[2] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]
>
> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[6]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[7] and *Copeland*.[8] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[9]

An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] K.S.A. 44-510e.

[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[9] *Id.* at 320.

be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland*.[10]

The ALJ determined that claimant exhibited a good faith effort to find work. Given claimant's testimony regarding his ongoing job search efforts and the fact that he makes 8 to 10 contacts per week, the Board agrees with that conclusion. Additionally, the fact that no job placement or vocational training has been offered, and with no expert opinion provided that claimant's job efforts are inadequate, the Board agrees that claimant's post-injury job search constitutes a good faith job search effort. Therefore, the Board will use claimant's actual wage loss of 100 percent in determining the amount of permanent partial general work disability to which claimant is entitled. Giving equal weight to the stipulated task loss of 75 percent, the Board finds claimant has suffered a permanent partial general disability of 87.5 percent for the injuries suffered on October 16, 2004. Thus, the Award of the ALJ should be affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered a compensable injury on October 16, 2004, while working for respondent. As a result of that injury, claimant was terminated from his employment with respondent after it was determined that respondent was not able to accommodate claimant's restrictions. Even though claimant has put forth a good faith job search, he has been unable to find a job, and is, therefore, entitled to a permanent partial general disability pursuant to K.S.A. 44-510e of 87.5 percent. The Award of the ALJ is affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated November 5, 2007, should be, and is hereby, affirmed.

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[10] See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007) and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

IT IS SO ORDERED.

Dated this ____ day of February, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge